United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

287

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,511

UNITED STATES OF AMERICA,

Appellee

v.

MACK J. BRYANT,

Appellant

On Appeal From A Judgment
Of The United States District Court
For The District of Columbia

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* Denotes cases on which primary reliance is placed.

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Argument

The critical issue in the case at bar is whether there was sufficient evidence to support a finding that appellant intended to commit rape. Over 25 years ago, this Court established a standard governing this "essential element" of intent: "There must be an intent to use such force and violence as may be necessary to overcome resistance." Hammond v. United States, 75 U.S. App. D.C. 397, 398, 127 F.2d 752, 753 (1942); Robinson v. United States, 78 U.S. App. D.C. 63, 64, 136 F.2d 283, 284 (1943). While the Government has failed expressly to acknowledge the existence of this standard, the Government has not challenged its continuing validity. Nor has any reason been shown why a standard so long adhered to in this and many other jurisidctions, see Brief for Appellant 15-24, 37-39, should be ignored or lightly abandoned.

Yet as shown in the Brief for Appellant and in Argument I below, a careful and accurate reading of the record shows insufficient evidence or corroboration of intent to meet this standard. And even if the Court does not accept this ground for acquittal, where the crucial question of intent rests on such scant evidence the incorrect, incomplete, ambiguous and abstract instructions to the jury were plainly erroneous, as shown in the Brief for Appellant and Argument II below.

I. CONTRARY TO THE ALLEGATIONS OF THE GOVERNMENT, THE RECORD IN THE CASE AT BAR DOES NOT SUPPORT A FINDING OF "INTENT TO USE SUCH FORCE AND VIOLENCE AS MAY BE NECESSARY TO OVERCOME RESISTANCE."

A. CONTRARY TO THE ALLEGATION OF THE GOVERNMENT, DEFENDANT NEVER "DEMANDED" SEXUAL INTERCOURSE.

The Government contends that Mr. Bryant's intent to commit rape is demonstrated by the fact that he "demanded intercourse with Mrs. Buster . . . ." (Govt. Br. 3.) Yet the record shows clearly that appellant made no such demand. Accepting as true the testimony of Mrs. Buster, Mr. Bryant said only: "I want to" have sexual intercourse. (Tr. 18.) The Government mistakenly confuses desire for sexual intercourse with intent to commit rape.* Mr. Bryant's purported statement plainly does not demonstrate "intent to use such force and violence as may be necessary to overcome resistance."

Thus the case at bar is strikingly different from Robinson v. United States, supra, relied upon by the Government. In Robinson, the defendant, late at night, had "stealthily" broken into the

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* This misstatement of the facts is consistent with the Government's erroneous implication in the District Court that the only intent that need be shown is intent to have sexual intercourse:

> "The evidence will then show . . . . this man . . . expressed his intentions as to what he intended to do . . . that he specifically intended to have sexual relations with her." (Tr. 6.)

> "Now, this is not only an assault, it is an assault with intent, by way of stating it, and with force. . . .
> ". . . All of the elements were there, the assault, the intent through his own words, and then the struggle with her." (Tr. 109.)

room of the victim, whom he had never before met. He had partially undressed himself, lain down beside her on the bed, attempted to touch her private parts and choked her to still her cries. When she pleaded with him to leave, he answered, "No; I am going to finish what I came here to do." 78 U.S. App. D.C. at 63, 136 F.2d at 283. Nothing remotely comparable to this record has been shown in the case at bar.

B. CONTRARY TO THE ALLEGATION OF THE GOVERNMENT, DEFENDANT "DESISTED" AT A TIME WHEN HE COULD MOST EASILY HAVE TAKEN ADVANTAGE OF COMPLAINANT.

The Government alleges that Mr. Bryant desisted "only after Mrs. Buster had fled to the safety of a public hallway [and] screamed for help there . . . only in the public hallway could appellant have taken advantage of her torn dress . . . ." (Govt. Br. 4.) The record, however, is to the contrary.

Accepting Mrs. Buster's testimony as true, "I got away from him and started running to the front door. But he caught me in the living room and grabbed the back of my dress; and just as I got my hand on the door" (Tr. 18), the shoulder strap of the dress broke and Mrs. Buster was forced to hold it up with one hand. (Tr. 30-31, 48.) At no other time had Mrs. Buster been more defenseless against anyone intent upon rape. Indeed, she had not yet called for help. (See Tr. 18-19.) Yet Mrs. Buster admitted that at this precise instant Mr. Bryant desisted:

"Q. And he kept holding it, didn't he?
"A. After it tore, he let go of it.
"Q. He let go of it right away?
"A. Yes." (Tr. 48.)

Moreover, according to the testimony of Mrs. Buster, Mr. Bryant desisted almost as soon as the purported incident began. Mrs. Buster said that as soon as she "knew" they were struggling, "I tried to divert his attention by telling him the cigarette was burning me" (Tr. 18), and that she "got away" from him "maybe two or three seconds after" telling him that the cigarette was burning her. (Tr. 38-39.) She also said that from the initial encounter until she was out in the hallway the entire incident lasted for only "two or three minutes." (Tr. 22.) This repeated evidence from the alleged victim herself is clearly inconsistent with a finding of "intent to use such force and violence as may be necessary to overcome resistance."

C. CONTRARY TO THE ALLEGATION OF THE GOVERNMENT, NOTHING IN DEFENDANT'S "CONDUCT AT THE TIME OF THE ARREST" SUGGESTS INTENT TO COMMIT RAPE.

Among the factors cited by the Government as corroborating appellant's intent to commit rape was his "conduct at the time of the arrest." (Govt. Br. 5.) Yet nothing in appellant's conduct at the time of arrest suggests intent to commit rape. Officer Horstkamp testified that upon entering the building the officers saw Mr. Bryant "standing at the foot of the basement stairway." (Tr. 74.) Officer Rollins testified that he observed defendant coming up the basement steps and that defendant "turned to go

back down the steps" after seeing the officer. (Tr. 89-90.) While Officer Horstkamp proceeded to Mrs. Buster's apartment, Officer Rollins asked Mr. Bryant a series of questions including his name, where he was living and what he was doing in the building. The record shows that Mr. Bryant was responsive to each of these inquiries, and that when the officer asked Mr. Bryant to accompany him to the second floor, Mr. Bryant agreed. (Tr. 91-92.) Nothing in that conduct in any way suggests intent to commit rape.

This Court has clearly held, most recently in Allison v. United States, No. 21,862 (D.C. Cir. Feb. 17, 1969), that no person may be convicted of a sex offense in this jurisdiction in the absence of corroboration of "all the material elements of the crime charged." Slip op. at 5. Independent evidence suggesting in this case that defendant assaulted Mrs. Buster or desired to have sexual intercourse -- even had such evidence been presented -- would be plainly insufficient to corroborate Mr. Bryant's alleged intent "to use such force and violence as may be necessary to overcome resistance." Moreover, the Government has failed to demonstrate why the decision below should not be reversed if only on the authority of Allison; indeed the Government does not even challenge the argument (Br. for Appellant 26-28) that there was more independent evidence of intent in Allison than in the case at bar.*

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* The Government's contention that "reliance" on Allison is "misplaced" because the complainant in Allison was not an adult (Govt. Br. 5) is fully answered in the Brief for Appellant at 28-31.

D. THE MANY INCONSISTENCIES AND INHERENT IMPROBABILITIES IN MRS. BUSTER'S TESTIMONY HAVE NOT BEEN SATISFACTORILY EXPLAINED.

The Brief for Appellant (at 29-30) outlined a number of the inconsistencies and inherent improbabilities in Mrs. Buster's testimony -- testimony that provides the only support for the conviction below. In its lengthy comment on the issue (Govt. Br. 5-6 n.5), the Government has not satisfactorily explained these discrepancies. The Government claims only that the alleged cigarette burn that left no mark on Mrs. Buster "does not defy ordinary experience." The Government contends that "nothing in the record suggests that a distraught Mrs. Buster could not" have removed her purportedly torn dress, selected another dress, gotten out her steam iron, waited for it to warm up, set up her ironing board, ironed the second dress and put it on -- all within the five minutes before the police arrived. This contention does "defy ordinary experience." Apart from challenging the veracity of Mrs. Watson, the Government makes no comment at all concerning the absence of evidence that Mrs. Buster's alleged screams were heard by neighbors or that they awakened her sleeping child.

The Government apparently recognizes that the finding of two unopened cans of beer by the police officers, combined with the testimony by both Mrs. Buster and Mr. Bryant that some beer had been consumed, necessarily contradicts Mrs. Buster's testimony

that Mr. Bryant brought only two cans of beer to the apartment.* The Government makes no effort to explain this inconsistency, noting only that it "hardly merits rejection of her testimony." Finally, the Government tries to explain the failure of the police to find the glass of water -- Mrs. Buster's excuse for letting Mr. Bryant into the apartment** -- by noting that "the police did not search the house." However, while this fact might explain the failure of the police to find the missing cans of beer, it cannot explain the absence of the glass: Mrs. Buster claimed that Mr. Bryant set the glass of water on the living room floor (Tr. 17) and that it "was still sitting on the floor when they [the police] came" (Tr. 36), yet although the police officers discussed the glass of water with Mrs. Buster (Tr. 78) and remained in the living room for 15 minutes (Tr. 82), they saw no glass of water (Tr. 81).

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This discussion and the detailed appraisal of the record in the Brief for Appellant (at 15-31) show that the Government's

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* Compare Mr. Bryant's testimony (Tr. 116, 120, 122), that he brought six cans of beer to the apartment and that both he and Mrs. Buster consumed some of the beer.

** "I heard a knock on the door . . . and I saw Mr. Bryant standing out there. And I knew him, so I let him -- I mean I opened the door, and . . . he asked me if he could have a glass of water." (Tr. 17.)

case rests upon the frailest of evidence. When the mistaken contentions of the Government, considered above, are put aside, the record might be thought to show that Mr. Bryant made an improper advance; it might even support a finding of assault; but it cannot support a finding of "intent to use such force and violence as may be necessary to overcome resistance" to sexual intercourse.

II. WHERE THE EVIDENCE OF INTENT TO COMMIT RAPE WAS MARGINAL AT BEST AND THE GROUND OF THREE SEPARATE MOTIONS FOR ACQUITTAL IN THE DISTRICT COURT, THE INCORRECT, INCOMPLETE, AMBIGUOUS AND ABSTRACT INSTRUCTION TO THE JURY CONSTITUTED PLAIN ERROR.

A. THE DISTRICT COURT'S STATEMENT CONCERNING "ATTEMPTING TO COMMIT CARNAL KNOWLEDGE" -- A STATEMENT CONCEDED BY THE GOVERNMENT TO BE "INCORRECT" -- CANNOT BE "CORRECTED" BY OTHER LANGUAGE WHOSE AMBIGUITY IN THE SAME RESPECT THE GOVERNMENT DOES NOT CHALLENGE; NOR ARE THESE ERRORS OTHERWISE CURED.

The Government concedes that the District Court's instruction to the jury that defendant was charged with "attempting to commit carnal knowledge" (Tr. 166) was "incorrect." (Govt. Br. 9.) Even if the balance of the charge were unexceptionable, this error would have substantial significance -- the statement clearly implies that desire to have sexual intercourse would be sufficient to convict. (See Br. for Appellant 40.) The Government contends that this erroneous instruction should be overlooked, however, since the indictment, read aloud by the District Court and taken into the jury room, contained language "correcting" the error. (Govt. Br. 10.)

Even aside from the question whether such a plainly "incorrect" instruction could have been cured by a properly worded statement of intent, the Government's argument will not suffice. For the language relied upon was erroneous in the same respect. As shown in the Brief for Appellant (at 40-41), the language was at best ambiguous and could be read literally to require no more than "intent to carnally know."

The Government does not argue that this language is unambiguous. It contends merely that the "ambiguity, if any, was effectively clarified by the court's unequivocal instruction . . . that the assault and intent to have sexual intercourse must be accompanied by 'the purpose to carry this intent into effect by force and against the will of the complainant.'" (Govt. Br. 10.) Yet this Court held in Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965), that it was "plain error" to use the concept and language of "purpose" in place of a definition of specific intent in instructions to the jury. Moreover, this lone statement on which the Government bottoms its case "rings with the abstract quality so often criticized in jury instructions." Gregory v. United States, No. 21,089, slip op. at 15 (D.C. Cir. March 18, 1969).

Thus on the "essential element" of intent to commit rape, the instruction consists of an "incorrect" statement implying that desire for intercourse is sufficient, "corrected" by language at best ambiguous in the same respect, and "effectively clarified" by a single abstract phrase of questionable validity.* Nowhere is the "essential element" presented in terms that would be understood and appreciated by the average juror, in the clear

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* Moreover, while instructing the jury on the lesser included offense of assault, the District Court confused the crucial issue of intent still further, see Brief for Appellant at 34, a point not addressed by the Government.

and precise language of this Court: "intent to use such force and violence as may be necessary to overcome resistance."

B. THE GIVING OF A "STANDARD INSTRUCTION" CANNOT CURE THE CRUCIAL OMISSIONS FROM THAT INSTRUCTION, NOR CAN IT JUSTIFY THE FAILURE TO GIVE THE "STANDARD INSTRUCTIONS" -- OR ANY OTHER INSTRUCTIONS -- (1) DEFINING INTENT AND SPECIFIC INTENT, (2) EXPLAINING PROOF OF INTENT, AND (3) DEFINING AND EXPLAINING THE NEED FOR CORROBORATION.

The Government emphasizes the fact that part of the instruction to the jury was a "standard instruction" (Govt. Br. 7), one "adopted by the Junior Bar Association model instructions" (Govt. Br. 9). See District of Columbia Bar Association Junior Bar Section, Criminal Jury Instructions for the District of Columbia, No. 102 (1966) [hereinafter cited as Criminal Jury Instructions]. While this "standard instruction" includes a single abstract and questionable statement of intent, discussed above, it does not contain the clear and careful statement by this Court in Hammond, reiterated in Robinson, that the "essential element" of intent requires a finding of "intent to use such force and violence as may be necessary to overcome resistance." Thus the "standard instruction" is plainly erroneous in a case such as this, where the evidence of intent is so meager that the issue should go to the jury -- if at all -- only under the most precise of instructions.

Moreover, where the District Court elects to give one standard instruction, it is difficult to explain the absence of other standard instructions no less directly related to the issues in question. The giving of one standard instruction can hardly

justify the failure to give three standard instructions -- or any other instructions -- on three subjects central to the case at bar. The District Court did not give the standard instruction on "Intent," Criminal Jury Instructions, No. 42, which would have defined for the jury the elusive term of art "specific intent." Nor did the Court give any other instruction defining specific intent.* The District Court did not give the standard instruction on "Proof of Intent," Criminal Jury Instructions, No. 43, which would have clarified for the jury the subtle yet vital importance of the disputed evidence. Nor did the Court give any other instruction on proof of intent. The District Court did not give the standard instruction on "Corroboration," Criminal Jury Instructions, No. 59, which would have informed the jury of the corroboration requirement and the manner in which it must be met. Nor did the Court give any other instruction concerning corroboration or informing the jury of this requirement.

The District Court's failure to give instructions on these

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* The Government cites several cases said to support "the court's not specifically defining 'intent'" (Govt. Br. 7), of which only two involve instructions concerning intent, Stewart v. State, 112 Ga. App. 193, 144 S.E.2d 561 (1965), and Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963). The Georgia decision in Stewart is clearly inconsistent with this Court's decisions in Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965), and Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965), both holding it "plain error" to fail to instruct the jury on the meaning of intent in robbery prosecutions. See also Liles v. United States, 129 U.S. App. D.C. 268, 393 F.2d 669 (1967). The Turf Center instruction, alleged by the Government to involve "failure to define 'intent'" (Govt. Br. 8), actually included at least four lengthy paragraphs explaining the requirement of intent and its proof. See 325 F.2d at 797 n.5.

issues is not merely technical. The three instructions go to the heart of defendant's case -- the subject of three separate motions to acquit (Tr. 9-11, 102-12, 162) -- the insufficiency of the evidence concerning intent to commit rape. Nor does omission of these instructions appear to be a universal practice. See, for example, the charge to the jury in United States v. Higgins,* set out in Appendix B to the Brief for Appellant, in which all of these instructions were given. And the fact that these questions are so important as to be the subject of "standard" or "model" instructions makes it even clearer that their complete omission in the case at bar constitutes plain error.

C. THE GOVERNMENT'S ARGUMENT THAT THE INSTRUCTIONS ARE ACCEPTABLE SINCE THEY "NEITHER OMITTED A STATUTORY ELEMENT OF THE OFFENSE NOR INCORRECTLY DEFINED A REQUISITE ELEMENT" DRAWS TWO ENTIRELY ARTIFICIAL AND INCORRECT DISTINCTIONS.

Apparently recognizing the significance of the mistakes and omissions in the District Court's instructions, the Government attempts to defend them on the ground that they "neither omitted a statutory element of the offense nor incorrectly defined a requisite element." (Govt. Br. 8.) Even if this Court does not agree with the argument above that the instructions "incorrectly defined" the essential "requisite element" of intent, the Government's justification is faulty in at least two respects.

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* Crim. No. 589-66 (D.D.C. 1967), aff'd, ____ U.S. App. D.C. ____, 401 F.2d 396 (1968), the most recent reported decision of this Court affirming conviction for assault with intent to commit rape.

First, it draws the artificial and incorrect distinction between "statutory element[s] of the offense" and those additional requirements and more complete explanations established by decisions of this Court. Instructions are intended to provide the jury with more direction than it could obtain from the bare statutory language. They should inform the jury of the full meaning of the crime as it has been defined and developed through the judicial process. Particularly where the evidence is as meager as in the case at bar, the instruction should provide a careful elaboration of the elements of the offense -- whether or not derived solely from the language of the statute. As this Court said in Byrd v. United States, 119 U.S. App. D.C. 360, 361-62, 342 F.2d 939, 940-41 (1965): "Since there are essential elements of common law robbery not stated in the statute, such as the specific intent to steal, mere reading of the statute was plainly inadequate." (Emphasis added.) The Government has shown no reason why the failure properly to instruct the jury on intent to commit rape -- said by this Court in Hammond to be an "essential element," 75 U.S. App. D.C. at 398, 127 F.2d at 753, of the crime -- is not likewise "plainly inadequate."

Second, the Government's argument draws the artificial and mistaken distinction between elements of the crime "incorrectly defined" and those wholly omitted from the instruction, not explained or defined at all. In the case at bar, proof of intent, specific intent and corroboration were not "incorrectly defined;"

they were not defined or explained at all. Indeed, with regard to the requirement of corroboration, appellant might have preferred an incorrect definition to none at all -- it would at least have informed the jury that some additional measure of proof was required. And these omissions are particularly significant where appellant's primary contention throughout the proceedings in the District Court was the absence of proof of intent to rape. Thus neither of the distinctions proposed by the Government justify the plainly erroneous instructions in the District Court.

D. THE ARGUMENT THAT A CORROBORATION INSTRUCTION IS UNNECESSARY MISSTATES THIS COURT'S HOLDING IN FRANKLIN v. UNITED STATES AND CHALLENGES THE ENTIRE REQUIREMENT OF CORROBORATION.

The Government contends that in the absence of a specific objection, the District Court did not err in failing to inform the jury of the requirement of corroboration. Such a contention was rejected by this Court in Franklin v. United States, 117 U.S. App. D.C. 331, 330 F.2d 205 (1963), Brief for Appellant at 44-47. In the case at bar, the Government alleges that:

> "this Court has held that failure to object to the court's charge on corroboration of identity in a rape prosecution is not plain error within F.R.Cr.P. 52(b), where sufficient evidence exists on which the jury could properly have found such corroboration. Franklin v. United States . . . ." (Govt. Br. 10.)

But this reading of Franklin makes no sense. Defendant's "failure to object" (emphasis added) cannot be "plain error" within Rule 52(b); that Rule itself deals with errors "not brought to the attention

of the court." And if the statement is meant to imply that failure to instruct the jury as to the requirement of corroboration is not plain error, Franklin holds precisely the opposite.

Moreover, the Government concludes by citing an argument that goes not merely to the corroboration instruction but to the entire requirement of corroboration in sexual offenses: "'[T]he purpose of the rule is already completely attained by the judge's power to set aside a verdict upon insufficient evidence.' 7 Wigmore, Evidence, § 2061 (3rd ed. 1940)." (Govt. Br. 11.) This reasoning suggests that the entire corroboration requirement should be abandoned; indeed, in a passage not quoted by the Government, Dean Wigmore concludes that it would be "[b]etter to inculcate the resort to an expert scientific analysis of the particular [complaining] witness' mentality, as the true measure of enlightenment." Id.*

The corroboration requirement is intended to make the jury aware of the special dangers of complainant's testimony in cases involving sexual offenses. Indeed, one of the corroboration decisions relied upon by the Government provides the clearest statement of this Court's position on the essentiality of the corroboration instruction:

> "While the matter of corroboration is initially for the trial court, like any other question as to the legal sufficiency of the evidence to warrant submission of the case to the jury, it is the latter's function

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* See also 3 id. § 924a. For a recent conclusion that this approach "would be highly unsatisfactory," see Note, Corroborating Charges of Rape, 67 Colum. L. Rev. 1137, 1142 (1967).

> to decide whether the standard of corroborative proof has been met. It goes without saying that the trial court must afford the jury proper and adequate guidance to enable that determination. Borum v. United States, No. 20,270, slip op. at 7-8 (D.C. Cir. Dec. 21, 1967) (emphasis added).

Unless this Court is prepared to abandon the corroboration requirement altogether and replace it with "expert scientific analysis" of the complainant's "mentality," the District Court's failure to mention the need for corroboration is plain error.

Conclusion

For the reasons stated in Argument I and in the Brief for Appellant at 15-31, the trial court erred in refusing to grant appellant's motion for entry of a judgment of acquittal, and the judgment below should therefore be reversed and a judgment of acquittal entered.

Even if this Court does not accept these grounds for acquittal, for the reasons stated in Argument II and in the Brief for Appellant at 32-48, the trial court failed properly to instruct the jury, and the judgment below should therefore as a minimum be reversed and the case remanded for a new trial.

Respectfully submitted,

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June 19, 1969

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of June, 1969, he did serve the foregoing "Reply Brief for Appellant" upon the United States Attorney for the District of Columbia by sending two copies by official United States mail to Sandor Frankel, Esquire, Office of the United States Attorney, United States Court House, Washington, D.C.

Respectfully submitted,

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Statement of Issues Presented for Review

1. In a trial for assault with intent to commit rape, where complainant's own testimony established that appellant was on social terms with complainant; was invited into her apartment; expressed a desire to have sexual intercourse with her; attempted to embrace her; struggled with her briefly; never attempted to touch her private parts or to open or remove his clothing; never threatened her; and desisted within seconds of learning her resistance to sexual intercourse; and where the entire incident lasted for only "two or three minutes," did the District Court err in holding that there was sufficient evidence to sustain a finding of the "essential element" of intent to commit rape, the "intent to use such force and violence as may be necessary to overcome resistance"?

2. Where complainant's testimony contained numerous inconsistencies and inherent improbabilities, and where there was no independent corroborating evidence of her testimony concerning the alleged intent of appellant to commit rape, was it error for the District Court to refuse to grant a judgment of acquittal?

3. Where the District Court failed to instruct the jury as to the meaning of "specific intent;" the means of

proving intent; the nature of force required to sustain a finding of intent to commit rape; and the requirement that complainant's testimony be corroborated; and where the instructions incorrectly implied that appellant had intent to commit rape if he intended to commit sexual intercourse, was the instruction plainly erroneous?

This case has not previously been before this Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,511

MACK J. BRYANT,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

On Appeal From A Judgment
Of The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a final decision of the United States District Court for the District of Columbia, entering a judgment of guilty after a conviction on a charge of assault with intent to commit rape, D.C. Code § 22-501 (1967). The jurisdiction of the District Court was based upon D.C. Code § 11-521 (1967). This Court's jurisdiction to hear this appeal is based upon 28 U.S.C. § 1291 (1964).

Statement of the Case

Appellant was convicted in the District Court of assault with intent to commit rape, D.C. Code § 22-501 (1967), and sentenced to imprisonment for a period of three to nine years.

Background. On April 24, 1968, at approximately noon, District of Columbia police officers John A. Horstkamp and Jerome L. Rollins, in separate scout cars, received radio calls to proceed to Apartment 202, 350 U Street, N.E., to investigate an "assault" (Tr. 73, 89) reported by the complainant, Mrs. Delores Buster. Upon arriving at that address, the officers met and proceeded into the building, where they encountered the appellant, Mr. Bryant. (Tr. 74, 89-90.) Officer Horstkamp proceeded to Apartment 202, where Mrs. Buster responded to his knock. The officer asked her what the trouble was "and she responded that she had been assaulted." (Tr. 75.) Officer Rollins testified that during this time he had stopped to ask Mr. Bryant his name, his place of residence and what he was doing in the building, that Mr. Bryant told the officer he was visiting his sister on the second floor, and that he agreed to accompany Officer Rollins to the second floor to confirm this fact. (Tr. 90-92.)

As Mr. Bryant and Officer Rollins climbed the stairs to the second floor landing, Mrs. Buster was standing at the door of her apartment conferring with Officer Horstkamp.

Upon seeing Mr. Bryant, Mrs. Buster remarked, according to her own testimony, "That's him." (Tr. 20.) At that time the officers took Mr. Bryant into custody.

Preliminary hearing was held on April 26, 1968, and Judge Edward A. Beard bound the appellant over to the grand jury on a charge of assault with intent to commit rape. On May 16, 1968, the grand jury entered a presentment against Mr. Bryant for "assault with intent to commit rape," and the presentment and an indictment were filed in open court on June 5, 1968. Tr. of Pleadings, etc., Item 1.

Testimony at the Trial. On August 28 and 29, 1968, the case was tried in the United States District Court before the Honorable John H. Pratt and a jury. Complainant testified that on April 24, 1968, she was residing in Apartment 202, 350 U Street, N.E., with one child, age five or six months. She said that she was using the name Mrs. Delores Burt, the name of her first husband, from whom she was divorced. (Between April 24, 1968, the date of the alleged assault, and the date of the trial, August 28, 1968, Mrs. Burt remarried and her name became Mrs. Delores Buster.) (Tr. 12, 26-27.)

Mrs. Buster testified that before the day in question she had seen Mr. Bryant on five or six separate occasions during the month of April, when she went to the apartment of her next door neighbor, Mrs. Hazel Mae Watson, who was baby-sitting for Mrs. Buster. (Tr. 13-14.) During most of the month

of April, Mr. Bryant had been residing with Mrs. Watson, who is his sister, although by April 24 he had moved to the residence of Mrs. Dorothy Ann Thomas, another sister. (Tr. 128, 144-45, 154.)

Although Mrs. Buster first testified that she had never seen Mr. Bryant anywhere other than Mrs. Watson's apartment, she later acknowledged that he had been in Mrs. Buster's apartment with her before April 24th. (Tr. 15, 16, 52.) She also admitted that she had been in the presence of Mr. Bryant in Mrs. Watson's apartment during at least one evening under social circumstances and while beer was being consumed (Tr. 27-28), confirming the testimony of Mr. Bryant (Tr. 114, 138-39) and Mrs. Watson (Tr. 143, 145-146). Apart from this, Mrs. Buster denied having dated or gone out socially with Mr. Bryant (Tr. 15).

Mrs. Buster testified that sometime after 11 a.m. on the morning of April 24, 1968, Mr. Bryant knocked on her door, asking for a glass of water, and that she let him in and gave him a glass of water. She said that he had brought two cans of beer with him in a bag and that he drank the beer while they talked. She said that Mr. Bryant never finished the water and that it was still sitting on the living room floor when the police arrived. (Tr. 17, 24, 35-36, 50.)*

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* The police officers found two unopened beer cans in a brown paper bag. Although the police officers discussed the glass of water with Mrs. Buster and were in the living room for 15 minutes, they saw no glass of water. (Tr. 78, 81-82.)

Complainant testified that she went to check her baby, who was sleeping, and encountered the appellant in the hallway (within the apartment) while she was returning to the living room. She said that Mr. Bryant "started putting his arms around me," that she asked "'what are you trying to do?'" and that he responded "'I want to f*** you.'" (Tr. 17-18.)

Mrs. Buster said that she struggled with Mr. Bryant momentarily (Tr. 22, 37-38), receiving "bruises" or "brush burns" from the walls of the apartment on her arms in the course of the struggle. (Tr. 36, 66-72.)* She testified at various times during the trial that the appellant had "started" to put his arms around her, that he had "embraced" her, that she had been "successful enough . . . to keep him from" getting his arms around her, that he put both arms around her, and that she "didn't remember" whether or not

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* The police officers testified that complainant had pointed out a "red mark" or "bruise" on her neck and some "scratches" on her arms at the time they saw her. (Tr. 75-76, 80, 94.) Mrs. Buster repeatedly contended that she had been burned by a cigarette held by the appellant, although the alleged cigarette burn left no mark. (Tr. 18, 30, 65-68.) Mrs. Buster also said that she had suffered a bruise on her stomach, although she admitted that she did not know how she had received that bruise and never showed it to anyone. (Tr. 36, 66, 69-70.) Mr. Bryant testified that he had never fought or struggled or wrestled with Mrs. Buster and that he did not strike or threaten her in any way. (Tr. 120, 122, 135-36.)

he had put both arms around her. (Tr. 18, 43-46.) To a question whether the appellant had in any way caressed "any of your private sections" the complainant responded, "I don't know." (Tr. 25-26.)

At this point, according to the testimony of the complainant, the parties fell to the floor and "some way I got away from him and started running to the front door." (Tr. 18.) This occurred "maybe two or three seconds after" complainant allegedly told Mr. Bryant that his cigarette was burning her (Tr. 38-39), which was apparently immediately after the struggle began. (See Tr. 18.) As Mrs. Buster moved toward the door, she testified, Mr. Bryant caught the neck of her dress; the shoulder strap of the dress broke and the appellant let go of the dress "right away." (Tr. 18, 30-31, 47-48.) A multi-colored dress, "torn on the shoulder and the side" (Tr. 93, 95-96), was identified by Mrs. Buster as the dress in question (Tr. 21) and introduced in evidence (Tr. 102).*

Mrs. Buster said that "when I got to the door, I ran

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* On direct examination, Mrs. Buster had initially claimed that "he ripped it [the dress] off me," and the United States Attorney had implied that the dress had been "torn off" Mrs. Buster. (Tr. 18, 21, 22.) She later testified that she had merely held the broken shoulder strap up with one hand. (Tr. 31.) Mr. Bryant testified that he had not grabbed or torn Mrs. Buster's dress, and that on the day in question she was wearing a short housecoat or short dress, not the multi-colored dress introduced in evidence. (Tr. 122, 137.)

out in the hall and hollered. Somebody must have heard me." (Tr. 18-19.)* She testified that Mr. Bryant "stood in my doorway and looked at me" and then "walked around to the top of the stairs." (Tr. 19, 64.) Complainant admitted that she had been standing "halfway between the door and the stairway" and that Mr. Bryant "walked past me" on his way from the doorway of the apartment to the top of the stairs. (Tr. 32, 46-47.) She said that the entire struggle, from the beginning until she was out in the hallway, lasted for only "two or three minutes." (Tr. 22.)

When Mr. Bryant reached the top of the steps, Mrs. Buster testified, she ran back into the apartment and closed the door, which automatically locked. (At this time she secured neither of the two additional locks installed on the door. (Tr. 22-23, 43.)) She testified that she went into the kitchen "to iron another dress" but returned to the door when she heard the knob "jiggling." She said that she then saw through a

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* Later in the trial, complainant again alleged that she had called out for help and that she believed someone had heard her. (Tr. 63, 65.) However, despite the suggestion in the record that there were at least four other residents on the second floor of the building (Tr. 141), no evidence was introduced that would support this testimony. Mrs. Watson, who was asleep in her apartment at the time of the alleged assault (Tr. 142) and whose bedroom adjoins Mrs. Buster's kitchen (Tr. 13), testified that she heard no scream and was not awakened until a policeman knocked on her door around 1:30 p.m. (Tr. 142). No evidence was introduced suggesting that Mrs. Buster's sleeping child was awakened during the alleged incident.

peephole that the appellant was outside her door, secured another lock on the door and telephoned the police. (Tr. 19, 25.)

When the police officers arrived, Mrs. Buster was wearing a dress other than the dress alleged to have been torn during the struggle with the appellant; she gave the officers the torn garment. (Tr. 76-77, 83, 93.) Mrs. Buster several times testified that she completed the ironing of the second dress and changed into it between the telephone call and the arrival of the police. (Tr. 25, 61-62.) However, she twice testified that the police arrived in five minutes after her call (Tr. 20, 62), an interval consistent with the fact that both officers were in their scout cars when they received the radio call, one eight blocks away (Tr. 73) and the other three blocks away (Tr. 89).*

Mr. Bryant testified that he had known Mrs. Buster for several months before the date of the alleged assault (Tr. 113) and had been in her apartment on three or four previous occasions, "smooching" (Tr. 117, 129, 132). He said that he had often previously expressed his affection for her and had

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* The complainant three times testified that she was not ironing at the time defendant arrived or during his visit (Tr. 39, 53, 55), although she was apparently uncertain even as to that (see Tr. 58). Before ironing a dress, she would have had to get out her electric steam iron, plug it in and wait for it to heat up, as well as setting up her ironing board. (Tr. 39-41.) Because complainant's iron was a steam iron, it might also have been necessary for her to take the time either to fill it with water or to dampen the dress before ironing.

bought her a pair of alligator shoes. (Tr. 118-19, 130-31.) He testified that on one previous occasion he and Mrs. Buster had arranged to go to a tourist home together to have sexual relations, but that the arrangements had never been consummated because Mrs. Buster was afraid her husband* would find out. (Tr. 118, 137-38.)

Mr. Bryant testified that on April 24 he went to Mrs. Buster's apartment sometime around noon with six cans of beer in a paper bag. (Tr. 116-17, 120.) He said that she invited him in to sit down (Tr. 116), and that they both began to drink the beer. (Tr. 120-22, 134.) He testified that in their conversation Mrs. Buster suggested that they could be "friends" if Mr. Bryant would "stop drinking" and "straighten up." (Tr. 117.) When Mr. Bryant objected to her demand that he "straighten up," an argument began (Tr. 136), and there was some name calling (Tr. 119-20, 123-24, 136). Mr. Bryant testified that the argument lasted about 15 or 20 minutes (Tr. 118), and that Mrs. Buster became emotionally upset during that time (Tr. 124).

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* There were several references in the testimony to Mrs. Buster's "husband," "Buddy." (Tr. 116, 118, 120, 123, 132-33, 135-36.) It is not clear from the record whether this testimony refers to the man from whom Mrs. Buster said she had been divorced before April 24, 1968, or to the man whom she married between April 24 and the date of the trial, August 28, 1968.

Finally, Mrs. Buster said that she was going to "quit" Mr. Bryant because he was not going to straighten up (Tr. 124) and because she thought she was pregnant and was afraid that her husband would find out about their relationship. (Tr. 120, 123, 133.) She asked Mr. Bryant to leave before her husband returned (Tr. 136).

Mr. Bryant testified that he left the apartment building immediately, lit a cigarette and walked to the corner of Fourth and U Streets to catch a cab. (Tr. 118, 124.) Unable to find a cab, he returned to the building and knocked on his sister's door. When he received no answer, he went back downstairs and encountered the police officers just as he was about to leave the building, some 25 or 30 minutes after he left Mrs. Buster's apartment. (Tr. 126-27.)

Motions by the Appellant. The appellant moved for entry of a judgment of acquittal on the basis of insufficient evidence on three occasions during the trial: following the Government's opening statement (Tr. 9-11), following the completion of the Government's case (Tr. 102-12), and at the completion of all the evidence (Tr. 162). Each of these motions was based upon the major authorities cited below. Each of these motions was denied.

Instructions to the Jury. Following the denial of appellant's third motion for an entry of judgment of acquittal,

the Court instructed the jury (Tr. 162-73). Excerpts from the instructions to the jury, including all references in the instructions to (1) the elements of assault with intent to commit rape, (2) the elements of assault, (3) intent, (4) corroboration, (5) the relationship between the crimes of assault with intent to commit rape and assault and (6) the indictment, are presented as Appendix A to this brief.

Deliberation and Verdict. The jury deliberated for six hours and 15 minutes (see Tr. 175) and returned with a verdict which the foreman announced as "guilty of attempted rape." (Tr. 176.) The Deputy Clerk then polled the jury as to whether or not they found the defendant guilty of "assault with intent to commit rape," and each juror responded affirmatively. (Tr. 176-78.)

Judgment and Sentence. On October 18, 1968, the District Court entered a judgment of guilty and the appellant was sentenced to imprisonment for a period of three to nine years. This appeal is taken from that final judgment.

Summary of Argument

I.

This Court has established that the "essential element" of assault with intent to commit rape is defendant's "intent to use such force and violence as may be necessary to overcome resistance." Hammond v. United States, 75 U.S. App. D.C. 397, 398, 127 F.2d 752, 753 (1942); Robinson v. United States, 78 U.S. App. D.C. 63, 64, 136 F.2d 283, 284 (1943). Accepting complainant's testimony as true, and viewing it in the light most favorable to the Government's case, it establishes at most a desire for sexual intercourse combined with an assault.

Indeed, complainant's testimony demonstrates that appellant intended to -- as he did -- desist at the slightest resistance. He never threatened complainant nor did he take advantage of her torn dress in the manner of one determined to ravish regardless of resistance. He never touched her private parts or attempted to open or remove his clothing. Within seconds after complainant indicated her resistance to sexual intercourse, appellant desisted entirely in his efforts, walking calmly past complainant without any threat or other sign of intent to use force. The entire incident from beginning to end lasted for "two or three minutes." These circumstances could not support a finding that appellant had the requisite intent to commit rape, Baber v. United States,

116 U.S. App. D.C. 358, 324 F.2d 390 (1963), and the judgment below should therefore be reversed and a judgment of acquittal should be entered.

II.

The testimony of complainant contains a number of inconsistent statements and inherent improbabilities regarding her conduct on the day in question, and there is evidence in the record suggesting a possible motive for falsification on her part. Under these circumstances and in the absence of independent corroboration of complainant's testimony concerning appellant's intent to commit rape, Allison v. United States, No. 21,862 (D.C. Cir., Feb. 17, 1969), the judgment below should be reversed and a judgment of acquittal should be entered.

III.

Even if this Court were to accept neither of the two independent grounds for acquittal advanced above, the judgment below should at a minimum be reversed and remanded for a new trial because the District Court failed properly to charge the jury. The instructions failed to define or explain the term "specific intent" or to discuss proof of intent, leaving the jury to speculate on these essential matters. The instructions failed to

define or explain the nature or degree of force intended to be used required to sustain a finding of "intent to commit rape," leaving the jury unaware of the standard established by this Court in Hammond, supra, the requirement of "intent to use such force and violence as may be necessary to overcome resistance." The instructions incorrectly implied that appellant had "intent to commit rape" if he desired to have sexual intercourse. And the instructions failed to state, define or explain the requirement that complainant's testimony be corroborated, notwithstanding this Court's decision in Franklin v. United States, 117 U.S. App. D.C. 331, 330 F.2d 205 (1963), requiring such an instruction.

These are not merely technical misstatements or omissions from a lengthy charge. They render the charge wholly deficient, Williams v. United States, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942), on the essential issue raised at the trial -- the absence of appellant's intent to employ such force as might have been necessary to overcome any resistance to sexual intercourse. At the very least, this case posed a close question concerning that crucial issue. Particularly in light of this Court's policy of requiring the jury to be instructed with extreme precision under such circumstances, the instructions to the jury constituted plain error.

Argument

I. THE DISTRICT COURT ERRED IN REFUSING TO ENTER A JUDGMENT OF ACQUITTAL BECAUSE, EVEN ACCEPTING THE COMPLAINANT'S TESTIMONY AS TRUE, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT APPELLANT INTENDED TO EMPLOY WHATEVER FORCE AND VIOLENCE MIGHT HAVE BEEN NECESSARY TO OVERCOME ANY RESISTANCE BY COMPLAINANT TO SEXUAL INTERCOURSE.*

This Court has held that the elements of "assault with intent . . . to commit rape," D.C. Code § 22-501 (1967), are three-fold: (1) an assault, (2) an intent to have carnal knowledge (sexual intercourse) and (3) a purpose to carry into effect this intent with force and against the consent of the victim. Hammond v. United States, 75 U.S. App. D.C. 397, 127 F.2d 752 (1942). "The intent of the accused is an essential element in the offense . . . . There must be an intent to use such force and violence as may be necessary to overcome resistance." Id. at 398, 127 F.2d at 753; Robinson v. United States, 78 U.S. App. D.C. 63, 64, 136 F.2d 283, 284 (1943). This "essential element" of intent was plainly missing in the case at bar.

Even if complainant's testimony were accepted as entirely true and viewed in the light most favorable to the Government's case,** it was not sufficient to support a finding that appellant

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* In connection with this Argument, appellant desires the Court to consider the entire transcript of the trial, particularly Tr. 5-85, 89-96, 102-46 and 154, and the District Court's ruling on appellant's second motion for an entry of a judgment of acquittal, Tr. 102-12.

** Mrs. Buster's testimony differed materially from that of appellant and contained a number of inconsistent and inherently improbable statements. See Argument II below.

intended to use whatever force and violence might have been necessary to overcome Mrs. Buster's resistance to sexual intercourse. Mrs. Buster's testimony indicated that Mr. Bryant was invited into her apartment, spoke with her for a few minutes, and then expressed his desire to have sexual intercourse with her. He tried, perhaps successfully, to put his arms around her, and they struggled and fell to the floor, causing her some bruises and scratches. She then got away from Mr. Bryant and ran toward the door. He caught the neck of her dress and, as she continued running, one shoulder strap broke. Mr. Bryant immediately let go of the dress and Mrs. Buster ran out into the hall toward the stairwell. The entire struggle, from the beginning until Mrs. Buster reached the hallway, lasted for "two or three minutes." Appellant then came to the apartment door and walked directly past Mrs. Buster on the way to the stairs. She ran back into the apartment and closed the door; after hearing Mr. Bryant jiggle the door handle, she called the police.

Mr. Bryant did not threaten Mrs. Buster. He did not attempt to remove any of her clothing, nor did he take any advantage of her torn dress. He did not disrobe or expose himself in any way. Within seconds after Mrs. Buster indicated her resistance to sexual intercourse, he desisted

entirely in his efforts. Thus, taken in the light most favorable to the Government's case, Mrs. Buster's testimony establishes at most a desire for sexual intercourse combined with an assault. It does not suggest that Mr. Bryant at any time intended to use whatever force might prove necessary to accomplish sexual intercourse against the will of complainant. Indeed, Mrs. Buster's testimony almost conclusively demonstrates that appellant intended to -- as he did -- desist at the slightest resistance. Under such circumstances, there was insufficient evidence of the "essential element" of intent to sustain a finding of guilty on a charge of assault with intent to commit rape.

On a number of occasions in recent years, this Court has carefully reviewed the evidence of the "essential element" of intent in such cases. In Hammond v. United States, supra, defendant had been convicted of assault with intent to rape his 17-year-old sister-in-law. In the early hours of the morning, he had gone to her bedroom, pulled off the covers while she was sleeping and "touched her private parts with his hand." When she awakened and screamed, defendant ran from the house. This Court reversed, remarking that although defendant was apparently guilty of a serious offense, the conclusion that he intended rape was "pure conjecture:" "That he had a lustful desire is not enough. There must have been the intent to ravish if the desire were denied." 75 U.S.

App. D.C. at 297, 127 F.2d at 753.

In Baber v. United States, 116 U.S. App. D.C. 358, 324 F.2d 390 (1963), there was evidence that defendant had entered complainant's house unlawfully through a locked door, that he had attempted to remove and finally torn her skirt and that he had opened his pants and exposed himself. This Court said that there had "clearly" been an assault and that "[t]here was also an evident intent to have carnal knowledge." Id. at 360, 324 F.2d at 392. Nevertheless, the Court reversed a conviction for assault with intent to commit rape, on the ground that there was insufficient evidence of defendant's intent to employ whatever force might be necessary to overcome the resistance of the complainant, relying in part on the fact that the defendant fled when complainant "pushed him off and knocked him to the floor." Id.

In several respects, these cases offer more evidence of intent than the case at bar. In Baber, the defendant had attempted to remove complainant's clothing and had opened his pants and exposed himself. He had illegally broken into the victim's house, a fact that in itself suggests unlawful intent. In Hammond, the defendant had taken advantage of a sleeping girl and had offensively caressed her private parts.

There are two elements relied upon by this Court in Hammond and Baber that might be alleged to distinguish those

cases from the case at bar. First, defendants in those cases made no threats or other remarks that bore on their intent. Second, there was relatively little use of physical force or violence in those cases. Both of these factors were present in Robinson v. United States, supra, in which this Court affirmed a conviction for assault with intent to commit rape.

But a review of the facts in Robinson demonstrates its inapplicability to the case at bar. There was evidence in Robinson that defendant, late at night, had "stealthily" broken into the room of complainant, whom he had never before met. Defendant had partially undressed himself, lain down beside her on the bed, attempted to touch her private parts and choked her to still her cries when she awoke. After taking her money, he returned to the complainant's bed; when she pleaded with him to leave, he responded "No; I am going to finish what I came here to do." 78 U.S. App. D.C. at 63, 136 F.2d at 283. He left only when complainant struck him with an electric fan and shouted loudly enough to bring others to the scene. There was independent medical evidence of injury to the complainant, and spermatozoa were found on the bed sheet.

Unlike the case at bar, complainant and defendant in Robinson had never before met. Defendant broke into complainant's apartment at night, unlike the case at bar in which Mr. Bryant

was invited in as one who had been there before. Unlike the case at bar, the defendant had "partially undressed himself." Unlike the case at bar, Robinson attempted to touch the private parts of the complainant. Unlike the case at bar, there was independent evidence (the spermatozoa) of sexual activity. Unlike the case at bar, defendant's purported statement suggested not merely his desire ("I want") to have sexual intercourse, but his intent to use force and violence if necessary "to finish what I came here to do." And unlike the case at bar, defendant's entire course of conduct after learning of complainant's resistance suggested an intent not to desist until he had accomplished his felonious objective. Thus the prior decisions of this Court demonstrate that there was insufficient evidence in this case for the jury to find, beyond a reasonable doubt, that Mr. Bryant intended to use whatever force and violence might have been necessary to overcome any resistance of Mrs. Buster to sexual intercourse.*

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* See also Fountain v. United States, 98 U.S. App. D.C. 389, 236 F.2d 684 (1956) (defendant took indecent liberties with child, but no independent evidence of intent to commit rape; conviction reversed). Compare Higgins v. United States, ___ U.S. App. D.C. ___, 401 F.2d 396 (1968) ("vicious" assault on a 73-year-old woman previously unknown to defendant; two eyewitnesses; defendant arrested "partially disrobed;" conviction affirmed).

It is clear that the use of force or violence does not in itself establish an intent to commit rape:

> "The proof of a mere assault and battery, however aggravated it may be, without the intent to rape, will not warrant a conviction of assault with intent to rape, nor will the proof of mere licentious conduct, or even violent familiarity, with the female in an effort to induce her to yield to the embraces of the assailant, where there is no proof that he intended to have carnal knowledge of her by force and against her will. The specific intent charged is the gist of the offense." People v. Cieslak, 319 Ill. 221, 224, 149 N.E. 815, 816 (1925).

Nor does defendant's sexual desire, combined with the use of force, constitute assault with intent to commit rape. In State v. Williams, 324 Mo. 179, 22 S.W.2d 649 (1929), defendant was convicted of assault with intent to commit rape on evidence that he had repeatedly struck his cousin's wife, pointed a rifle at her and twice told her that he would rape her if she refused to have intercourse with him. Reversing his conviction, the court said that from all the facts:

> "The most we can say of the State's evidence is that it tends to prove an aggravated assault and battery by appellant . . . coupled with a coarse and drunken announcement of his lascivious desire." Id. at 183, 22 S.W.2d at 650.

Such cases often rely on the well established doctrine that "assault with intent to persuade the woman is not sufficient." Perkins, Criminal Law 673 (1957) (emphasis in original). "[I]f there was mere intent to use persuasion to obtain her

consent, there could be no conviction unless the jury found, beyond a reasonable doubt, that appellant intended to use such force as was necessary to overcome the resistance of the prosecutrix." Squyres v. State, 127 Tex. Crim. 421, 426, 77 S.W.2d 218, 221 (1934) (citing trial court's instructions). The courts have been particularly careful to distinguish forceful attempts to "persuade" -- albeit criminal assaults -- from assaults with intent to commit rape where the defendant and the appellant are not total strangers. See, e.g., People v. Bush, 19 Ill.2d 151, 166 N.E.2d 91 (1960) (complainant and defendant had met on other occasions at the same apartment); Cape v. State, 61 Okla. Crim. 173, 66 P.2d 959 (1937) (defendant and complainant had spent the afternoon and evening on a date together); State v. Kendall, 73 Iowa 255, 34 N.W. 843 (1887) (defendant was an "acquaintance" of complainant). The crucial determination for this Court is whether the "licentious conduct" or "violent familiarity" or even "aggravated assault" evidenced an intent to go still farther, the "essential" intent to employ "such force and violence as may be necessary to overcome resistance" to sexual intercourse, Hammond v. United States, supra.

The record in this case shows no such evidence. Indeed, there are only three facts in the entire record that might be argued to support a contention that Mr. Bryant intended to employ whatever force might be necessary to overcome Mrs. Buster's

resistance to sexual intercourse.

First, there is evidence that Mrs. Buster received some bruises and scratches. While such evidence might support a conviction for assault, it does not demonstrate the additional proof of intent universally required to convict for assault with intent to commit rape. This is particularly true where, as here, the nature and degree of the alleged assault fall far short of the violence normally associated with the crime of rape. It is apparent from the record that the most Mr. Bryant attempted was to embrace the complainant, and that her bruises and scratches were the result of their having fallen to the floor. And Mrs. Buster testified that Mr. Bryant abandoned all force within seconds of first encountering resistance, that the entire incident from beginning to end lasted only "two or three minutes." Such conduct is clearly inconsistent with a specific intent to commit rape.

Second, there is Mrs. Buster's testimony that Mr. Bryant told her he wanted to have sexual intercourse. But desire to have sexual intercourse is not intent to rape, it is not even as much as the "evident intent to have carnal knowledge" that the Court found insufficient to convict in Baber, and certainly no more than the "lustful desire" that the Court held to be "not enough" in Hammond.

Third, there is Mrs. Buster's allegation that appellant

caught her dress, causing it to be torn, but immediately releasing it, as she proceeded toward the apartment door. The absence of felonious intent is affirmatively demonstrated by the fact that Mr. Bryant let go of the dress as soon as it ripped, rather than pursuing the obvious advantage in the manner of one bent on rape. The same is true of Mrs. Buster's testimony that Mr. Bryant walked directly past her on the way out of the apartment without causing or threatening her the slightest harm. Nor is there evidence in the record that Mr. Bryant threatened Mrs. Buster at any time during the incident or that he asked or warned her not to reveal the incident to others. Under all the circumstances, the alleged conduct is more consistent with a desire to end the incident without a further scene than with an intent to rape.

The evidence at bar could be claimed to show "licentious conduct, or even violent familiarity." People v. Cieslak, supra, 319 Ill. at 224, 149 N.E. at 816. But appellant submits that there was insufficient evidence to support a conclusion that he at any time had "an intent to use such force and violence as may be necessary to overcome resistance," Hammond v. United States, supra. Therefore, the judgment below should be reversed and a judgment of acquittal should be entered.

II. THE DISTRICT COURT ERRED IN REFUSING TO ENTER A JUDGMENT OF ACQUITTAL BECAUSE COMPLAINANT'S TESTIMONY CONCERNING THE INTENT OF APPELLANT WAS WITHOUT CORROBORATION.*

Even if this Court does not accept the grounds for acquittal advanced in Argument I above, the judgment below should be reversed and a judgment of acquittal entered for want of corroboration of complainant's testimony concerning the crucial issue of intent. It has long been recognized that special difficulties are created because a sexual accusation is "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 Hale, Pleas of the Crown *635. Time has not lessened these dangers; police investigators in one of our major urban areas estimate that 80 to 90 percent of the rapes reported "are not really rapes." Comment, Police Discretion and the Judgment that a Crime Has Been Committed -- Rape in Philadelphia, 117 U. Pa. L. Rev. 277, 279 n.8 (1968).

In response to these special dangers, District of Columbia law clearly provides "that no person may be convicted of a 'sex offense' on the uncorroborated testimony of the alleged victim." Allison v. United States, No. 21,862, slip op. at 3 (D.C. Cir., Feb. 17, 1969). This Court recently noted that it has "never diluted the requirement

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* In connection with this Argument, appellant desires the Court to consider the same portions of the Transcript cited in connection with Argument I.

that the corpus delicti be corroborated" in sexual cases* and held that "all the material elements of the crime charged" must be corroborated in such cases. Id. at 4-5. While Allison involved the crime of assault with intent to commit carnal knowledge of a child under the age of 16, this Court's decision, and particularly its treatment of Hammond and Baber, id. at 5-6, make it clear that in a prosecution for assault with intent to commit rape there must be corroboration of defendant's intent to use whatever force might be necessary to overcome the resistance of the complainant.

In Allison, defendant was accused of assault with intent to commit carnal knowledge upon an 11-year-old girl. Defendant had stopped the complainant and her two brothers on the way home, taken them into his house, and given them money to purchase sodas. The complainant testified that defendant prevented her from leaving with the boys to buy the sodas, grabbed her, tried to kiss her, and then spread a white shirt on the sofa and threw her down on it. She said that they wrestled and defendant threatened to cut her neck off if she continued to scream. According to her testimony, defendant "opened his zipper and took out his private," got on top of her, and "tried to pull my pants down."

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* The Court has said that "the requirement of corroboration as to identity may be relaxed in certain circumstances," Allison v. United States, supra, at 4 & n.9, on the ground that "the danger of a fabricated rape is of greater magnitude than the danger of erroneous identification," id. at n.10.

Complainant's 10-year-old brother returned with the sodas and, hearing his sister's screams, looked through the keyhole of the door. He testified that he saw defendant on top of his sister on the couch, holding her down. He banged on the door and she managed to free herself and escape. Shortly thereafter and in hysterics she told a friend and the police her story.

The Court noted three arguable sources of corroboration of complainant's testimony: (1) the testimony of complainant's brother as to his sister's screams and defendant's being on top of her on the sofa; (2) the testimony of her friend and the police as to complainant's prompt complaint and emotional state; and (3) the absence of apparent motive for fabrication. Noting the impressionability of complainant and some minor inconsistencies in the record, however, this Court reversed, finding no corroboration of the material facts relating to the intent of the accused: his attempt to kiss complainant; his attempt to remove her clothing; his exposure of himself.

In order to support a conviction for assault with intent to commit rape, there must be corroboration of both material elements of intent: (1) the intent to have sexual intercourse with complainant and (2) the intent to employ whatever force might be necessary to achieve that objective. In the case at bar, proof of these essential elements is based on the uncorroborated testimony of the complainant, even

more clearly than in Allison. There was no corroboration of Mr. Bryant's alleged expression of desire to have sexual intercourse with Mrs. Buster. Even if the alleged tearing of the dress were considered relevant to Mr. Bryant's intent -- a point appellant disputes -- there was no corroboration of Mrs. Buster's testimony regarding how and by whom it was torn. And there was no corroboration that Mrs. Buster's bruises and scratches were caused by Mr. Bryant, even if such evidence were considered sufficient to corroborate an intent to employ whatever force might be needed. Compare Higgins v. United States, ____ U.S. App. D.C. ____, 401 F.2d 396 (1968), in which sufficient corroboration was found from the "vicious" nature of the assault, from medical testimony, from the immediate arrest of defendant partially disrobed and from the testimony of two eyewitnesses.

"The need for corroboration depends upon the danger of falsification." Thomas v. United States, 128 U.S. App. D.C. 233, 387 F.2d 191 (1967). This danger is particularly acute wherever (1) the complainant is young or impressionable or tells a story containing inherent improbabilities or inconsistencies, as in Allison, or (2) there is evidence in the record suggesting a possible motive for complainant to falsify or exaggerate her story, as in Farrar v. United States, 107 U.S. App. D.C. 204, 275 F.2d 868 (1959).* Such elements are clearly present in the case at bar.

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* The contention that "the necessity and sufficiency of corroboration" depend upon whether complainant was under the age of consent is "obviously untenable." Ewing v. United States, 77 U.S. App. D.C. 14, 16 n.3, 135 F.2d 633, 635 n.3 (1942).

First, the record shows a number of inconsistencies and inherent improbabilities in Mrs. Buster's testimony -- testimony that provides the only support for the conviction below. Mrs. Buster maintained that Mr. Bryant secured entry by requesting a glass of water which he left unfinished on the living room floor. Yet the police officers who were in her living room for 15 minutes and discussed this point found no such water.* Mrs. Buster testified that Mr. Bryant brought two cans of beer with him and drank some, but the police officers found two unopened cans of beer, suggesting either that no beer was consumed or that six beers -- as Mr. Bryant testified -- were brought and four consumed.

Mrs. Buster repeatedly contradicted herself on the simple question of whether or not Mr. Bryant had embraced her and didn't "know" whether or not he had touched her private parts. She testified to a cigarette burn that left no mark. Mrs. Buster insisted that she telephoned the police immediately after the alleged assault. However, this would have required her to remove her purportedly torn dress, select another dress, get out her steam iron, wait for it to warm up, set up her ironing board, iron the second dress and put it on -- all within the five minutes before the police arrived and

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* Moreover, Mrs. Buster first said at the trial that "I heard a knock on the door . . . and I saw Mr. Bryant standing out there. And I knew him, so I let him -- I mean, I opened the door, and . . . he asked me if he could have a glass of water." (Tr. 17.)

with hands she said were shaking. Finally, Mrs. Buster repeatedly testified that she screamed for help and that someone must have heard her. Yet this testimony also went without corroboration, despite substantial evidence in the record as to the likelihood that such screams would have been heard by her neighbors, including Mrs. Watson who was asleep in her apartment at the time and whose bedroom adjoined Mrs. Buster's kitchen. Nor was evidence introduced that the five or six month old infant in the apartment awakened during the purported commotion.

Second, there is evidence in the record that might suggest a motive for complainant to falsify or exaggerate her story. Appellant testified that Mrs. Buster became angry and upset when he rejected her efforts to make him "straighten up." He said that she believed herself pregnant and was afraid that her husband would find out about her relationship with appellant. In Farrar v. United States, supra, defendant's testimony suggested that complainant was a prostitute to whom he had refused to pay additional money. It was contended that corroboration might be found from the fact that the complainant had run to the nearby fire station as soon as possible after the incident and tearfully reported a rape. In a Memorandum denying the Government's petition for rehearing en banc, Chief Judge

Prettyman remarked that the circumstances alleged to provide corroboration were "clearly as consistent with innocence as with guilt -- with a vengeful purpose after a quarrel over money as with a rape." 107 U.S. App. D.C. at 213, 275 F.2d at 877.

Without corroboration of Mrs. Buster's testimony regarding appellant's intent, the judgment below should be reversed and a judgment of acquittal should be entered.

III. THE DISTRICT COURT FAILED PROPERLY TO INSTRUCT THE JURY.*

Even if this Court accepts neither of the independent grounds for acquittal advanced in Arguments I and II above, the judgment below should at a minimum be reversed and remanded for a new trial because the District Court failed properly to instruct the jury. It has long been the practice of this Court in serious criminal cases to review the record carefully for prejudicial error, whether or not urged by defendant at trial, and in particular to scrutinize the instructions to the jury. See Tatum v. United States, 88 U.S. App. D.C. 386, 388, 190 F.2d 612, 614 (1951); Williams v. United States, 76 U.S. App. D.C. 299 & n.3, 131 F.2d 21 & n.3 (1942). At the very least, the case at bar poses a close question on the essential issue of intent; in such cases, the instructions become particularly important:

> "[T]he closeness of the issue . . . imposed an obligation on the trial judge to instruct the jury with extreme precision, as he realized, and on us to review the charge with what, in a less doubtful case, would be undue meticulousness." Cooper v. United States, 123 U.S. App. D.C. 83, 85, 357 F.2d 274, 276 (1966) (separate opinion of Bazelon, Ch. J.).

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* In connection with this argument, the appellant desires the Court to read the entire instruction to the jury, Tr. 162-74. Excerpts from the instructions, including all references therein to (1) the elements of assault with intent to commit rape, (2) the elements of assault, (3) intent, (4) corroboration, (5) the relationship between the crimes of assault with intent to commit rape and assault, and (6) the indictment, are set out in Appendix A to this brief.

In this case, the instructions were plainly inadequate as a result of a number of serious errors and omissions, described more fully below, in the very areas in which the Government's case was weakest, the crucial issues of intent and corroboration.* Because of these "[p]lain errors or defects affecting substantial rights," Rule 52(b), Fed. R. Crim. P., see Argument III-E, the judgment below should be reversed and remanded for a new trial under proper instruction.

A. THE INSTRUCTIONS FAILED TO DEFINE OR EXPLAIN THE TERM "SPECIFIC INTENT" OR TO DISCUSS PROOF OF INTENT.

The District Court's instruction, excerpts from which are reproduced in Appendix A, lists the three elements of assault with intent to commit rape established by this Court in Hammond. The Court instructed the jury (Tr. 170) that the Government must prove beyond a reasonable doubt:

> "First: That the defendant made an assault upon the complainant.
>
> "Second: That he did so with specific intent to have sexual intercourse with the complainant; and

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* By way of comparison to the instruction in this case, there are set out in Appendix B to this brief some excerpts from the instruction to the jury in the most recent reported case in which this Court affirmed a conviction for assault with intent to commit rape, United States v. Higgins, Crim. No. 589-66 (D.D.C. 1967), aff'd, ____ U.S. App. D.C. ___, 401 F.2d 396 (1968).

> "Three: That he did so with the purpose to carry this intent into effect by force and against the will of the complainant."

Thus, the jury was instructed that at least some "specific intent" was a necessary element for conviction.

However, the court did not provide any further definition nor offer any other assistance to the jury as to the meaning or proof of "intent" or more particularly "specific intent."* Notwithstanding the repeated motions of appellant for entry of a judgment of acquittal based on insufficient evidence of intent, the court gave no instruction regarding proof of intent. See District of Columbia Bar Association Junior Bar Section, Criminal Jury Instructions for the District of Columbia, Instruction No. 43, "Proof of Intent" (1966) [hereinafter cited as Criminal Jury Instructions]. Moreover, the court provided no definition of the words "specific intent." See Criminal Jury Instructions, Instruction No. 42, "Intent."

By way of comparison to the case at bar, the instruction in United States v. Higgins, set out in Appendix B to this

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* The instruction given to the jury on the lesser included offense of assault did contain a definition of the intent required for that crime, "the general intent to do the acts which constitute the assault." (Tr. 171.) The proximity of this instruction to the unexplained reference to "specific intent" (see Appendix A), and the failure to charge the jury as required in Fuller v. United States, No. 19,532, slip op. at 13, 21 (D.C. Cir., Sept. 26, 1968) (en banc) that they were "to move on to consideration of the lesser offense only if they have some reasonable doubt as to the guilt of the greater offense," may have confused the jury and resulted in the application of the wrong definition of intent.

brief, contained a lengthy and careful explanation of specific intent and treatment of proof of intent, almost identical to the language in Criminal Jury Instructions, Instructions Nos. 42 and 43. Mr. Bryant was entitled to the verdict of a jury exposed to comparable instruction, particularly since the issue of intent was the fundamental question raised during the trial. The "specific intent" of the defendant is the "essense" of the crime of assault with intent to commit rape, State v. Whittinghill, 109 Utah 48, 53, 54, 163 P.2d 342, 344 (1945); it is "the gist of the offense," People v. Cieslak, supra, 319 Ill. 221, 224, 149 N.E. 815, 816 (1925). Yet the jury in this case was left to speculate on the meaning of specific intent.

The decisions of this Court demonstrate that it is reversible error to fail to explain or define a legal term of art or other phrase not readily understandable by the layman -- such as the crucial phrase "specific intent" in this case. In Liles v. United States, 129 U.S. App. D.C. 268, 393 F.2d 669 (1967), this Court held -- and stated that the United States Attorney agreed -- that the failure of a trial court to instruct the jury on the specific intent element of the crime of robbery constituted reversible error. A similar result was reached in Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965). In Mullen v. United States, 105 U.S. App. D.C. 25, 263 F.2d 275 (1958), appellant had chained her children in her house and was convicted under a statute making it a crime to "torture, cruelly beat, abuse, or otherwise

wilfully maltreat" a child. D.C. Code § 22-901 (1967). Although the instruction to the jury apparently included the statutory language "wilfully maltreat," this Court said that "[t]he court's charge omitted the requirement of an evil state of mind and was therefore erroneous." Id. at 26, 263 F.2d at 276. See also Miller v. United States, 121 U.S. App. D.C. 13, 18, 347 F.2d 797, 802 (1965) ("It is evident, therefore, that the term 'possession' must be correctly defined in the court's instructions so that the jury will be properly informed . . . ."); McDonald v. United States, 109 U.S. App. D.C. 98, 284 F.2d 232 (1960) (error not to define "malice aforethought"); Mann v. United States, 319 F.2d 404 (5th Cir. 1963) and cases cited id. at 408-09 (error in defining specific intent in tax evasion trial).

In Williams v. United States, supra, this Court reversed a conviction on one count of rape and two counts of assault with a dangerous weapon, because of a faulty instruction to the jury. The Court noted that "[a] basic defect of the charge is the failure to discuss and define the offenses included within the indictment," 76 U.S. App. D.C. at 300, 131 F.2d at 22, including the offense of assault with intent to rape.

> "Under the circumstances of this case, if the jury . . . had known the meaning of the factors, such as assault, intent, lack of consent, resistance to the full under the circumstances, physical force . . . it might have concluded that this defendant was not guilty of rape or even of any

> offense . . . . We have always been proud that under our law the elements which go to make up a crime are definitely established." Id.

And the Court concluded that the right to an impartial judgment by a jury of one's peers requires that the jury "know, with clear delineation, the issues upon which it is to pass judgment." Id. at 301, 131 F.2d at 23.

B. THE INSTRUCTIONS FAILED TO DEFINE OR EXPLAIN THE NATURE OR DEGREE OF FORCE INTENDED TO BE USED REQUIRED TO SUSTAIN A FINDING OF "INTENT TO COMMIT RAPE."

The instructions to the jury included a reading of the elements of assault with intent to commit rape as defined in Hammond. As to intent, the court said merely that defendant must have had "specific intent to have sexual intercourse with the complainant" and made his assault "with the purpose to carry this intent into effect by force and against the will of the complainant." Since "rape" under District of Columbia law is "carnal knowledge of [sexual intercourse with] a female forcibly and against her will," D.C. Code § 22-2801 (1967), the instruction regarding intent to commit rape is not a definition of the necessary element of intent; it is no more than an attempted paraphrase of the statutory language.

Nowhere did the instruction explain the nature and degree of intent required by previous decisions of this Court. Nowhere was the jury told that "there must be an intent to use such force and violence as may be necessary

to overcome resistance." Hammond v. United States, supra, 75 U.S. App. D.C. at 398, 127 F.2d at 753. Nowhere was the jury told that appellant must have been "prepared to use such force and violence as was necessary to overcome resistance." Robinson v. United States, supra, 78 U.S. App. D.C. at 64, 136 F.2d at 284. Thus the trial court failed to provide the jury with adequate guidance -- following standards long established by this Court -- as to the nature and degree of intent required.*

The instruction in the case at bar is deficient in precisely the same way as an almost identical instruction recently reviewed by the North Carolina Supreme Court. In that case, the instructions to the jury had defined the requisite intent as "the intent at that time to satisfy his passion on her person, without her consent and against her will." State v. Moose, 267 N.C. 97, 98, 147 S.E.2d 521 (1966). The court reversed a conviction for assault with intent to commit rape on the ground that this instruction was erroneous, indicating that upon retrial the intent that need be shown was "the intent to gratify his passion on the person of the woman at all events against her will and notwithstanding any resistance she may make." Id. at 98-99, 147 S.E.2d at 521-22.

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* See also Younger v. United States, 105 U.S. App. D.C. 51, 52, 263 F.2d 735, 736 (1959): "An assault with intent to commit carnal knowledge on a child is most certainly the taking of indecen liberties with a child, but . . . . plus an intent much more vicious, violent or aggravated."

(emphasis supplied by the court). See also McCullough v. State, 11 Ga. App. 612, 76 S.E. 393 (1912) (held, error not to charge that if defendant had the "intent to desist as soon as he found out that she would not consent, he is not guilty.")

Appellant does not contend that the precise language of Hammond or Robinson is required in order properly to instruct the jury as to the element of force. "The force actually used need be of no specific degree or character, but comes within the meaning of the law if it is reasonably calculated to subdue and overcome." Wills v. State, 193 Ark. 182, 183-84, 98 S.W.2d 72, 73 (1936). However, there must be some instruction informing the jury of the standard established by this Court in Hammond and followed consistently to this date.

C. THE INSTRUCTIONS INCORRECTLY IMPLIED THAT APPELLANT HAD "INTENT TO COMMIT RAPE" IF HE INTENDED TO COMMIT SEXUAL INTERCOURSE.

Apart from the crucial omissions discussed above, the instruction to the jury was faulty in that it implied at several points that the jury could convict if it found an assault combined with intent to have sexual intercourse. First, at an early point in the instruction (Tr. 166) and long before the next reference to the crime alleged (Tr. 170), the jury was informed that "[t]his defendant has been indicted, charged with

the offense of attempting to commit carnal knowledge." Overlooking the difference between attempt and intent,* it is clear that this statement is still plainly wrong. There may be a conviction pursuant to D.C. Code § 22-501 upon evidence merely of (1) an assault and (2) carnal knowledge (sexual intercourse), Wheeler v. United States, 93 U.S. App. D.C. 159, 211 F.2d 19 (1953), only where complainant is under the age of 16 and only because the statutory definition of rape, D.C. Code § 22-2801 (1967), eliminates the element of nonconsent in such cases. Allison v. United States, supra, slip op. at 5.

Many prosecutions under D.C. Code § 22-501 involve complainants under the age of 16, and this may account for the erroneous instruction. Nevertheless, it is clear that intent to commit rape of a complainant over the age of 16 requires an intent not merely "to commit carnal knowledge," but an intent to accomplish the unlawful objective forcibly and against the will of the complainant, an intent "to use such force and violence as may be necessary to overcome resistance." Hammond v. United States, supra, 75 U.S. App. D.C. at 398, 127 F.2d at 753.

Moreover, the next reference in the instruction to the offense was almost as misleading. The District Court read

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* There is evidence in the record suggesting that the jury, perhaps as a result of this instruction, failed to focus on the crucial issue of intent. When the jury returned, after six and one-quarter hours of deliberation, the foreman first announced its verdict as "guilty of attempted rape." (Tr. 176).

from the indictment in the case at bar, as follows (Tr. 170):

> "On or about April 24, 1968, within the District of Columbia, Mack J. Bryant assaulted Delores C. Burt, with intent to carnally know and abuse the said Delores C. Burt, forcibly and against her will."

This language is apparently intended to paraphrase the statutory language of "assault with intent . . . to commit rape," D.C. Code § 22-501 (1967). However, the indictment -- and accordingly the instruction to the jury -- misleadingly confused the statutory requirement of intent to commit rape with "intent to carnally know." The text of the indictment was at best ambigious. The phrase "forcibly and against her will" apparently modified not the word "intent" but the words immediately preceding the phrase, that is, "know and abuse the said [complainant]." It is also arguable that the words "forcibly and against her will" related back to the phrase immediately preceding the portion of the sentence set off by commas, that is, the phrase "assaulted [complainant]."

Ambiguities of this sort in the instructions to the jury constitute reversible error. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 U.S. 607, 613 (1946). In Commonwealth v. Jaynes, 137 Pa. Super. 511, 515-16, 10 A.2d 90, 92 (1939) (reversing), the court remarked that:

> "The jury might well have concluded from this excerpt delivered to them just before they retired to their room, that if the defendant's intention was to have sexual relations with the young woman -- as to which there was little doubt --, and if he used the least force, which apart from such intention, would amount to assault and battery-- of which there was likewise little doubt-- it was their duty to convict him of assault and battery with intent to ravish.
>
> * * *
>
> "But the offense with which he was charged in the indictment was not assault and battery with intent to have sexual relations with the young woman, but assault and battery with intent, forcibly and against her will, to have carnal knowledge of her." (Emphasis supplied by the court.)

And in Grossweiler v. State, 113 Ohio St. 46, 148 N.E. 89 (1925), the court reversed a conviction for assault with intent to commit rape, holding it error not to charge the jury that such a conviction could be sustained only if the testimony showed "not only that the accused had a purpose at the time of the assault to have sexual intercourse with the prosecuting witness, but also that he intended to use whatever degree of force might be necessary to enable him to overcome her resistance, and accomplish his purpose." Id. at 48, 148 N.E. at 89.

The danger ordinarily arising from ambiguous instructions is accentuated in this case because of the immense emphasis placed upon the misleading indictment. The reading of the indictment was the first information given to the jury

concerning the allegations in this case (Tr. 5), and the indictment itself was supplied to the jury, to be taken into the jury room during deliberation. (See Tr. 174.) Indeed, this Court has recently had occasion to restate the importance of the precise language approved by the grand jury and required to be included in the indictment. See Gaither v. United States, Nos. 21,780 & 22,148 (D.C. Cir., April 8, 1969).

This ambiguous indictment, coupled with the earlier clear misstatement of the charge, plainly and incorrectly implied that appellant could be shown to have had the intent to commit rape merely by a showing of desire to have sexual intercourse.* These are not just minor errors found in any lengthy set of instructions given to a jury; they are a plainly incorrect statement of the charge and an ambiguous indictment which the jury took with them as they went to deliberate. Moreover, they go to the heart of the issue most in question -- the "essential element" of the intent of the accused.

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* The record suggests that the United States Attorney shared this misconception: "The evidence will then show . . . . his intentions as to what he intended to do, . . . that he specifically intended to have sexual relations with her." (Tr. 6.) "All of the elements were there, the assault, the intent through his own words, and then the struggle with her." (Tr. 109.)

D. THE INSTRUCTIONS FAILED TO STATE, DEFINE OR EXPLAIN THE REQUIREMENT THAT COMPLAINANT'S TESTIMONY BE CORROBORATED.

Argument II above points out the special dangers that have led this Court to require corroboration of the testimony of the alleged victim in all sex offenses. Yet the vital need for corroboration can be completely ignored if -- as in the case at bar -- the instructions do not convey it to the jury. "[T]he rule requiring the corroboration warning to be given retains its importance as almost the only way by which the peculiar dangers of sexual charges are reflected in the legal process." Glanville Williams, Corroboration -- Sexual Cases, 1962 Crim. L. Rev. 662, 664.

This Court acknowledged as much in Franklin v. United States, 117 U.S. App. D.C. 331, 330 F.2d 205 (1963), in which it reversed a conviction for rape where the trial court had failed to instruct the jury on corroboration. Indeed, the instruction on "Assault With Intent to Commit Rape -- D.C.C. Section 501" in the bar association manual, Criminal Jury Instructions, Instruction No. 102, is immediately followed on the same page by a cross reference: "[Corroboration, Identity, Nature of Charge, Evidence of Other Offenses - See Instructions Nos. 59-62]."

Yet in the case at bar, the instructions to the jury not only failed to define or explain the requirement of corroboration,

they failed even to state the requirement or to use the word "corroboration." See Appendix A, in which the substance of the instruction given is set out. By way of comparison, the instruction in United States v. Higgins, Appendix B to this brief, devoted substantial consideration and placed substantial emphasis on the requirement of corroboration despite the fact that a variety of independent evidence was presented in Higgins, including medical evidence substantiating a "vicious" assault, the testimony of two eyewitnesses and the statement by a police officer that defendant was partially disrobed when arrested. In this case, on the other hand, complainant's testimony was at best equivocal and contained substantial inconsistencies and inherent improbabilities.

Under English law, "If the trial judge has omitted to give the warning on corroboration, a conviction will normally be quashed without more ado . . . ." Glanville Williams, supra, at 670. A corroboration instruction would be required in every trial for a sexual offense under the Model Penal Code, § 213.6(6) (Proposed Official Draft, 1962). In light of this Court's continued attention to the requirement of corroboration and its decision in Franklin where no corroboration instruction was given, it seems clear that the same

rule applies in the District of Columbia.*

E. THE FAILURE PROPERLY TO INSTRUCT THE JURY CONSTITUTED PLAIN ERROR; IN ANY CASE, APPELLANT'S OBJECTIONS WERE PRESERVED.

In cases where no objection has been taken to erroneous instructions, this Court has "repeatedly applied" Rule 52(b), Fed. R. Crim. P., allowing it to reverse for "[p]lain errors or defects affecting substantial rights." Taylor v. United States, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (1955). A few recent examples include Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965) (improper instruction regarding "intent"); Barry v. United States, 109 U.S. App. D.C. 301, 387 F.2d 340 (1961) (improper instruction regarding "knowledge" that securities were forged or counterfeited); McDonald v. United States, supra (failure to define "malice aforethought"); Mullen v. United States, supra (failure to define "wilfully maltreat").

This Court has recently suggested that in some cases involving major issues "the judge should not rely on defense counsel to request" the important instruction, noting particularly that an instruction on the subject at hand was

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* A similar issue has been raised in Dews v. United States, No. 22,347, argued before this Court on April 1, 1969. However, Dews involves corroboration of identification, a requirement which has sometimes been relaxed -- unlike the corroboration of intent required in the case at bar. Allison v. United States, supra, slip op. at 4.

available in the Criminal Jury Instructions. Macklin v. United States, No. 21,377, slip op. at 7 (D.C. Cir., Feb. 18, 1969). This Court did not reverse in Macklin, finding the charge as a whole sufficient and noting that the issue there at stake -- an identification problem resulting from the Supreme Court's decisions in Wade, Gilbert and Stovall -- "did not press itself [at the time of trial] with the force it has since acquired." Id. at 6. However, with regard to the case at bar, this Court long ago established the necessity for instructions defining the essential element of specific intent and explaining the requirement of corroboration, and there are no curative instructions that would support a conclusion that the charge was sufficient "as a whole."

Moreover, while appellant did not explicitly object to the jury instructions, he three times moved for a judgment of acquittal (Tr. 9-11, 102-12, 162), and the argument before the District Court made it plain that appellant was primarily challenging the showing and corroboration of the essential element of intent. In these circumstances, this Court has held that the right to challenge the instructions is "preserved by a motion for judgment of acquittal at the close of the Government's case . . . ." Franklin v. United States, supra, 117 U.S. App. D.C. at 334, 330 F.2d at 208 (1963).

Having made such a motion, appellant in the case at bar would have preserved his objection even if the erroneous failure to instruct did not constitute "plain error" pursuant to Rule 52(b).

Conclusion

For the reasons stated in Argument I, or for the independent reasons stated in Argument II, the trial court erred in refusing to grant appellant's motion for entry of a judgment of acquittal, and the judgment below should therefore be reversed and a judgment of acquittal entered.

Even if this Court accepts neither of the grounds for acquittal advanced in Arguments I and II, for the reasons stated in Argument III the trial court failed properly to instruct the jury, and the judgment below should therefore as a minimum be reversed and the case remanded for a new trial.

Respectfully submitted,

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April 9, 1969

Appendix A

Excerpts from instructions to the jury in United States v. Bryant, Crim. No. 711-68, Transcript 166, 170-73 (D.D.C. 1968).*

[Indictment and Elements of the Offense]

"This defendant has been indicted, charged with the offense of attempted to commit carnal knowledge.

* * *

"The indictment in this case reads as follows:

"On or about April 24, 1968, within the District of Columbia, Mack J. Bryant assaulted Delores C. Burt, with intent to carnally know and abuse the said Delores C. Burt, forcibly and against her will.

"The essential elements of the charge of assault with intent to commit rape, a violation of Title 22 of the District of Columbia Code, Section 501, are as follows, and each of these elements the Government must prove beyond a reasonable doubt:

"First: That the defendant made an assault upon the complainant.

"Second: That he did so with specific intent to have sexual intercourse with the complainant; and

"Three: That he did so with the purpose to carry this intent into effect by force and against the will of the complainant.

[Lesser Included Offense]

"This charge of assault with intent to commit rape also includes the lesser included offense of what is termed

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* These excerpts include all references in the instructions to (1) the elements of assault with intent to commit rape, (2) the elements of assault, (3) intent, (4) corroboration, (5) the relationship between the crimes of assault with intent to commit rape and assault, and (6) the indictment.

simple assault. And it is my duty at this time to charge you as to the elements of the crime of assault; and all of these elements, too, the Government must prove beyond a reasonable doubt:

"First: That the defendant committed an assault upon the complainant; and

"Second: That at the time of the commission of the assault, he intended to do the acts which constitute the assault.

[Definition of Assault and Intent Required for Assault]

"An assault is an attempt or effort with force or violence to do injury to the person of another, coupled with the apparent present ability to carry out such attempt.

"An assault my [sic] be committed without actually touching, striking or committing bodily harm on another.

"The intent which is an essential element of the offense of assault is the general intent to do the acts which constitute the assault.

"As stated in these instructions, an assault is basically an offensive touching, but it need not be an offensive touching if it puts the individual who is the recipient of the intention in fear of bodily injury or the equivalent.

[Relationship to Lesser Included Offense]

"Now, in this case I have charged you with respect to the elements of assault, as I stated before, because assault is a lesser included offense within the offense of the charge for which this defendant has been indicted, namely, the charge of assault with intent to commit rape.

* * *

"The possible verdicts in this case are as follows:

"With respect to the charge in the indictment, the offense of assault with intent to commit rape, there are two possible verdicts: Guilty or not guilty.

"With respect to the charge of assault, the lesser included offense, there are also two possible verdicts: Guilty or not guilty."

Appendix B

Excerpts from instructions to the jury in United States v. Higgins, Crim. No. 589-66, Transcript 248-53 (D.D.C. 1967), (conviction for assault with intent to commit rape), affirmed, ___ U.S. App. D.C. ___, 401 F.2d 396 (1968).

[Elements of the Offense]

"Now the essential elements of the offense of assault with intent to commit rape, each of which the government must prove beyond a reasonable doubt, are: one, that the defendant made an assault upon the complainant; two, that he did so with specific intent to have sexual intercourse with the complainant; three, that he did so with a purpose to carry this intent into effect by force and against the will of the complainant.

[Requirement of Corroboration]

"Now the law does not permit a conviction of assault with intent to commit rape on the basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required. To the extent which you may find that the testimony of the complaining witness is not corroborated in the manner required by law, you may not consider her testimony as evidence in this case. Before you may consider the testimony of the complainant as evidence on the matter of what is known as the corpus delicti, you must find that her testimony in this regard has been corroborated. The corpus delicti means the fact that a crime has been committed. In a case of assault with intent to commit rape, the corpus delicti is the occurrence of an assault upon a female against her will attempting to commit rape upon her. You may not find that such an offense occurred solely on the basis of the testimony of the complainant. Before you may consider the testimony of the complaining witness as evidence on the matter of the identity of the defendant as the person who committed the offense, you must find that her testimony in this regard has also been corroborated. You may not find that the defendant committed the alleged offense solely on the basis of the complainant. This requirement of corroboration means that there must be evidence independent of the testimony of the complainant of facts or circumstances which tend to support the testimony given by the complainant. This evidence may be direct or circumstantial, or both, as I have defined direct and circumstantial evidence for you. Unless

you find that the testimony of the complainant, as corroborated, and the other evidence in the case, when taken as a whole, establishes beyond a reasonable doubt all the essential elements of the offense, you must find the defendant not guilty.

[Character of the Charge]

"You are specifically cautioned against the permitting of the character of the charge itself to affect your minds in arriving at your verdict. You must permit only the evidence in this case to enter into your deliberations and findings.

[Identity]

"You are instructed that the identity of a defendant as the person who committed the crime is an element of every crime. Therefore, the burden is on the government to prove beyond a reasonable doubt not only that the crime, as alleged, was committed, but also that the defendant was the one who committed it. In this regard you are instructed that a defendant need not prove that another person or persons may have committed the crime, nor is the burden on the defendant to prove his innocence. If facts and circumstances have been introduced into evidence as to raise a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you should find the defendant not guilty of the offense.

[Relationship to Lesser Included Offense]

"Now in this case there is a lesser included offense. It is an assault. Thus you would not finish your work if you should find that the government had failed to prove beyond a reasonable doubt all of the elements of the crime charged, assault with intent to commit rape. You would then have to consider the lesser included offense of assault. What is assault? Well the essential elements of the offense of assault, each of which the government must prove beyond a reasonable doubt are: one, that the defendant committed an assault upon the complainant; and two, that at the time of the commission of the assault he intended to do the act which constituted the assault. An assault is an attempt or effort with force or violence to do injury to the person of another, coupled with the apparent present ability to carry out such

attempt. An assault may be committed without actually touching, striking or committing bodily harm on another. The intent, which is an essential element of the offense of assault is the general intent to do the act which constituted the assault.

[Intent and Proof of Intent]

"Now in connection with the crime charged in the indictment, assault with intent to commit rape, specific intent is required; the lesser included offense, assault, general intent. Now what is intent? Well intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means the fact that the thing was done consciously and voluntarily and not inadvertently or accidentally. Some criminal offenses, such as I said as assault, require only a general intent. Where this is so and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act. Other offenses, as I have said, assault with intent to commit rape, requires a specific intent. Now specific intent requires more than a general intent to engage in certain conduct or to do certain acts. A person who knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent. Intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but you may infer as to the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. An act is done knowingly if done voluntarily and purposely, and not because of mistake, inadvertence or accident. An act is done wilfully if done knowingly, intentionally and deliberately.

"Now with respect to specific intent, a wilful act means an act done voluntarily and purposely and with the specific intent to do that which the law forbids, that is, with bad purpose either to disobey or disregard the law.

[Role of Judge's Comments]

"Now, of course, members of the jury, my comments, if

any, on the evidence and on the facts are not binding on you, and if my recollection does not accord with your recollection of the testimony, then your recollection must prevail.

[Nature of Deliberation]

"I want you to take this matter and consider it deliberately in the light of the instructions that I have given to you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday life.

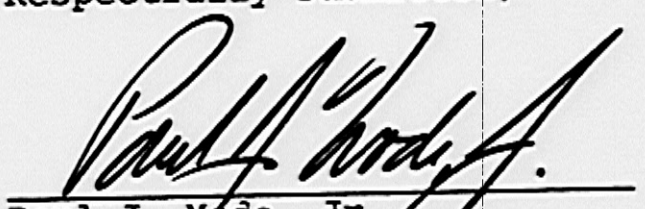
[Relationship to Lesser Included Offense]

"You will render a verdict and your verdict must be unanimous. It must be either guilty or not guilty of the crime charged, assault with intent to commit rape. If you should conclude that the defendant is not guilty of assault with intent to commit rape, then you must consider the lesser included offense of assault. In that event your verdict must again be either guilty or not guilty. Whatever the verdict may be, it must be unanimous."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ninth day of April, 1969, he did serve the foregoing "Brief for Appellant" upon the United States Attorney for the District of Columbia by causing two copies to be delivered to the Office of the United States Attorney, United States Court House, Washington, D.C.

Respectfully submitted,



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April 9, 1969